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Issue date: 21Sep2001

In the Matter of

TINA DIERKES,
Complainant

$$V.$$

WEST LINN-WILSONVILLE
SCHOOL DISTRICT,
Respondent

Case No.: 2000-TSC-00002

Thad Guyer, Esq.
Medford, OR
For the Complainant

Peter R. Mersereau, Esq.
Portland, OR
For the Respondent

Before: JEFFREY TURECK
Administrative Law Judge

RECOMMENDED DECISION AND ORDER¹

This cases arises out of a complaint filed with the Department of Labor's Occupational Safety and Health Administration on December 15, 1999 and amended on December 27, 1999 alleging

¹Citations to the record of this proceeding will be abbreviated as follows: CX–Complainant’s Exhibit; RX–Respondent’s Exhibit; ALJX–Administrative Law Judge’s Exhibit; TR–Hearing Transcript. In accordance with a protective order (*see infra*), Respondent’s Exhibits 37-43, and pages 911-22 of the hearing transcript are sealed. Redacted pages of the hearing transcript removing data that would identify the teachers who are being discussed will be substituted.

violations of employee protection provisions of the Toxic Substances Control Act, 15 U.S.C. § 2622 (hereinafter, “the Act”). Following its investigation, OSHA found on May 16, 2000 that the West Linn-Wilsonville School District (hereinafter, “Respondent”) was in violation of the Act and ordered that it pay damages to Complainant. Both parties appealed the finding to the Office of Administrative Law Judges, and the case was assigned to me in June 2000.

A hearing was held in Portland, Oregon, from February 27, 2001 through March 1, 2001, and on March 28, 2001. At the hearing, Complainant’s Exhibits 1, 10-12, 14-18, 21, 24, 25, 28, 29, 31-36, 39, 41, 45, 48, 50, 51, 53-54, 56, 58, 60, 69, 71, 75-76, 77, 79-87, 89, 95, 97 and 100-02, and Respondent’s Exhibits 1-13 and 15-45, were admitted into evidence. Near the conclusion of the hearing, Respondent moved to seal Respondent’s Exhibits 37-43, which consist of portions of several employees’ confidential performance evaluations (TR 932). Complainant objected on the grounds that the motion was untimely, as the exhibits had already been entered into the record, and because, as a matter of policy, evidence in whistleblower cases should be fully accessible to the public (TR 934-35). Because no public disclosure of the documents or testimony had yet been made, and because 29 C.F.R. Part 18 specifically permits the issuance of orders requiring the confidential treatment of documents, I granted the motion to seal Respondent’s Exhibits 37-43 and related testimony (TR 936). Further, over Complainant’s objections, I ordered the parties to refrain from using the relevant individuals’ names in their post-hearing briefs (TR 936). I stated that if the parties needed to refer to specific persons rather than just the exhibit number, they should submit two briefs – one with the names mentioned, which would be sealed, and one without, which would become part of the public record (TR 937). Following the hearing, I memorialized my ruling in a *Protective Order* sealing the exhibits and relevant testimony regarding the exhibits, and ordering the parties not to use the individuals’ names in their post-hearing briefs.²

² On May 22, 2001, Complainant’s counsel filed a motion to extend the time for filing post-hearing briefs. However, this motion requested an extension to a date that preceded the deadline for filing briefs. When informed of this inconsistency, Complainant’s counsel withdrew the motion. On June 26, Complainant again filed a motion to extend the time for filing briefs, citing computer problems. This motion was granted, and the deadline for filing the post-hearing briefs was extended until July 9. On that date, Complainant faxed this Office that he was again unable to submit the brief in a timely fashion, but would “tender it tomorrow with a motion to allow a late filing.” No brief appeared the following day, however, and no explanation as to why he failed to offer his brief appeared either. In fact, Complainant’s counsel made no contact with the Office until over ten days later, on July 20, 2001, when he e-mailed his brief and a third motion to allow for late filing. In his motion, Complainant’s counsel noted problems with his computer and “a file pagination problem with the transcript,” and referenced his European vacation as exacerbating these problems. I have little sympathy for counsel’s difficulties in meeting an extended deadline because he was on vacation in Europe, particularly in light of counsel’s pattern of tardiness in his filings before me in this and other matters. In fairness to his client, however, I will accept the post-hearing brief.

Complainant alleges that Respondent has retaliated against her and created a hostile work environment due to her contacts with state and federal agencies since June, 1999 regarding environmental hazards in the workplace. She requests that all Goal Three materials (*see infra*) be expunged from her personnel file; that her spring 2000 performance evaluation be revised; and that she receive compensation in the amount of \$25,000 based on psychological and emotional distress. *See Complainant's Post Hearing Brief*, at 46-47. Respondent does not deny that Complainant engaged in protected activity, but denies that: it subjected her to an adverse action; it was aware of her protected activity; and if it did subject her to an adverse action, that Complainant's protected activity was the reason for the adverse action. Respondent further denies that it subjected Complainant to a hostile work environment.

A. Background

1. History of Present Complaint

Complainant is a 51 year old kindergarten teacher with Respondent West Linn-Wilsonville School District, and currently works at Cedaroak Primary School. She has two daughters, and has been teaching since 1971 (TR 55). Claimant worked in a number of schools before her present placement, spending about one to three years in each position (TR 55-57). She moved to Oregon in 1992, and quickly became employed with Respondent teaching kindergarten full time at Willamette Primary in West Linn (TR 58-60). She transferred to Wilsonville Primary, where the alleged incidents of discrimination took place, in the summer of 1995, and remained there until the summer of 2000 when she transferred to Cedaroak.

Respondent is charged with the education of approximately 7,300 students in 11 schools throughout the district, consisting of six primary schools teaching kindergarten through fifth grade, three middle schools, and two high schools (TR 550, 945). The district employs between 450 and 700 individuals, including certified teachers, counselors, custodians, instructional assistants, and secretaries (TR 550, 945). Approximately 20 classroom teachers are employed at Wilsonville Primary (TR 551).

When Complainant began teaching at Willamette Primary in 1992, Jane Stickney was the school's principal. Dr. Stickney became Assistant Superintendent of the West Linn-Wilsonville School District in 1994, and Katy McCarney became the principal of Willamette Primary (TR 60). On about October 17, 1994, two chemicals used in the boiler of the school started to leak (TR 61; CX 10). Complainant testified that she experienced several symptoms resulting from this spill, and that almost immediately afterward she became sensitive to a number of chemicals to which she had not previously been sensitive (TR 61). She approached Ms. McCarney and informed her that she and other teachers were feeling sick (TR 62). Complainant testified that Ms. McCarney stated that she should shut her door so the chemical smell would not be so bad, and that the chemical was not toxic (TR 62-63).

Several weeks after the spill, Complainant contacted the Oregon Occupational Safety and Health Administration (TR 60, 63). She stated she did so because she had not been given “the documentation that I needed in order to know what the chemical was” and she was still feeling ill (TR 63). Oregon OSHA conducted an investigation and found small amounts of cyclohexylamine and diethylaminoethanol in the boiler system water, although there was no evidence of the chemicals in the classrooms (CX 11). The agency issued a citation list to Respondent (CX 10). Complainant testified that following the investigation and citation, Dr. Stickney and Ms. McCarney called teachers individually into the office and reprimanded them (TR 67). Complainant reported that Dr. Stickney was angry that the community knew about the spill, and told Complainant that she had worked very hard to build a good reputation for the school (TR 67-68). Complainant also stated that Dr. Stickney was upset that she had not moved a bookshelf in the hallway when the OSHA authorities stated that it was an environmental hazard, and that Dr. Stickney stated she was considering putting a letter of insubordination in Complainant’s personnel file (TR 69-70). Dr. Stickney denied reprimanding Complainant, and stated that she in fact had followed all of Complainant’s suggestions in dealing with the cleanup (TR 533). Dr. Stickney also testified that Complainant had failed to remove the bookshelves from outside her room after the school specifically told her to do so, and that OSHA levied a \$600 fine against the school as a result of this (TR 534). According to the OSHA Citation and Notification of Penalty, the bookshelves in the hallway only resulted in a \$180 fine, and the school’s failure to timely notify employees regarding the chemical hazards resulted in a \$500 fine (CX 10, at 4-5).

Complainant further testified that she spoke privately with Ms. McCarney about the incident, and that Ms. McCarney agreed that she should have acted faster and told the teachers of the leak earlier.³ In turn, Complainant agreed that she could have stayed in a dialogue with the school longer before reporting the leak to OSHA (TR 70). On the subject of the two women’s professional relationship, Dr. Stickney testified that Complainant “expressed a lack of faith in Ms. McCarney, which does erode the working relationship” (TR 535). Complainant testified in deposition that as a result of the incident she had lost faith in Ms. McCarney to do what was best for her and the children (TR 805). At the hearing she stated that Ms. McCarney had done a very good job in addressing the environmental concerns, and that she trusted the OSHA investigation certifying that the school was safe, but that she still felt unsafe at the school despite these assurances (TR 804).

Because she “just didn’t feel safe there anymore” (TR 73), Complainant began considering whether she should leave the school. She spoke with Dr. Stickney about transferring, and they discussed the possibility of moving her to Wilsonville Primary (TR 73). Complainant testified that Dr. Stickney said that two teachers wanted to leave that school because they had difficulties working with another teacher named Mary Renne, and that, if Complainant moved to the school, it “would be a challenging situation” (TR 73). Dr. Stickney testified quite differently, saying that the District did not have an opening for Complainant, but it wanted to support her, so a teacher at Wilsonville, Ms. Cody,

³ The teachers were not officially notified of the leak until a full month had passed.

was asked if she would be willing to trade positions with Complainant (TR 535). Dr. Stickney admitted that Ms. Cody wanted to leave Wilsonville because she “did not have a strong working relationship” with Ms. Renne, and that “they had some tension between them” (TR 559). When asked if other teachers had some problems interacting with Ms. Renne, she admitted that “Ms. Renne had some communication issues, yes” (TR 560). Glenn Gelbrich, the principal of Wilsonville Primary during the period at issue, similarly testified that Ms. Renne had conflicts with Ms. Cody and another kindergarten teacher, Ms. Nelson, who also left her position teaching with Ms. Renne (TR 313-16).

Despite the potential challenges that working with Ms. Renne might present, Complainant applied for a position at Wilsonville Primary. During her interview with Mr. Gelbrich, she discussed her reasons for transferring (TR 77). She stated that she had raised environmental concerns at Willamette, that her relationship with Ms. McCarney had become strained, and that she “was just not feeling safe and . . . wished to start new somewhere else” (TR 77). Complainant began working at Wilsonville in August 1995 (TR 78). She stated that, initially, she had an excellent working relationship with Mr. Gelbrich (TR 78). In late 1996, she had a conflict with Mr. Gelbrich regarding whether she would have a full-time aide in her classroom, but her employment generally proceeded without incident for her first two years at Wilsonville Primary, according to Complainant (TR 78-80)..

In the fall of 1997, Complainant and Ms. Renne became embroiled in an ongoing conflict regarding how to divide instructional assistant time (TR 80). Toward the end of September, the two women exchanged a series of e-mails about the issue, with Complainant ultimately stating that Ms. Renne was “being incredibly selfish” and that she refused to speak with Ms. Renne regarding the matter until after conferences (RX 1). By mid-October 1997, Mr. Gelbrich decided to intervene in the conflict because it was impacting both women, and other staff members were beginning to notice the friction between the two (TR 333). A meeting was held between Complainant and Mr. Gelbrich. Bill Bailey, the president of the West Linn-Wilsonville Education Association (the teachers’ union), was also present (TR 334, 703). Complainant had requested Mr. Bailey’s presence (TR 84; RX 6). She testified that she spoke with Mr. Gelbrich about redefining the boundaries of her relationship with Ms. Renne by limiting the extent of their professional involvement (TR 84). Following her October 20, 1997 meeting with Mr. Gelbrich, Complainant wrote him an e-mail thanking him for meeting with her, and promising that “I will do my very best to conduct myself in a professional manner with Mary and to communicate with her in a way that is cordial and respectful” (RX 7). The following day, Complainant met with Ms. Renne, and sent her an e-mail regarding their meeting. In this e-mail, Complainant stated that she did not want to continue teaching as a team with Ms. Renne, but wanted to only meet with Ms. Renne quarterly, and to have Mr. Gelbrich present when they met (RX 8). She further stated that, “[s]adly, as a result of all this, I wish to discontinue our personal relationship, too. . . . The difference in our teaching philosophy and the difference in our understanding of what teaming is all about are just too great for us to continue the way we were” (RX 8). Complainant testified that her relationship with Ms. Renne improved following this communication (TR 85).

Several days after her dispute with Ms. Renne was resolved, Complainant attended a professional growth seminar on conflict resolution and anger management (CX 12; TR 85; RX 10). Complainant testified that Mr. Gelbrich had recommended the course to her during a personal conversation in which she mentioned some family problems (TR 86). She stated that he told her he had had difficulty controlling his temper in the past, and that this course had been very helpful to him. Complainant submitted a Professional Development Fund Request to attend the program⁴ (CX 12). Complainant stated on the form that one of her goals for the year was to “sharpen my negotiating skills.” She added that, “I know I can use some new tools to help me more effectively manage my emotions and resolve conflicts” (CX 12, at 2). Complainant testified that she took the course to help teach her students how to deal with conflict and anger management, and that she did not attend the program as a result of her problems with Ms. Renne (TR 90-93). Mr. Gelbrich testified that he suggested the course to Complainant in the context of her conflict with Ms. Renne “earlier that fall” (TR 344), although the dates of Complainant’s e-mails regarding her dispute with Ms. Renne and the date of her certificate of completion of the anger management class indicate that the two incidences occurred contemporaneously (RX 1–10). Mr. Gelbrich acknowledged that he and Complainant had discussed their family histories when talking about the class, and stated that Complainant had jokingly referred to her “Greek temper” in this conversation (TR 345-46). Mr. Gelbrich further stated that he kept Complainant’s attendance at the conference confidential, although he did not recall whether he offered this or she requested it (TR 344). Complainant stated that she did not request that her attendance be kept confidential (TR 89-90).

Despite her contentions regarding why she attended the class, Mr. Gelbrich originally commented in her performance evaluation⁵ that Complainant had attended the seminar as a result of her conflict with Ms. Renne (TR 95, 352; RX 15). Mr. Gelbrich testified that he had meant to compliment Complainant for actively seeking to address problems that affected her work (TR 352; RX 15, at 1). Mr. Gelbrich also wrote in the evaluation that Complainant needed to “work to manage conflicts and

⁴ At the hearing, Complainant initially testified that only the top portion of CX 12 containing her name and the date and location of the program were in her handwriting (TR 88-89). However, it appears from her subsequent testimony regarding this document that she also wrote the second page of CX 12. *See* TR 90-91.

⁵ Mr. Gelbrich explained that Complainant is a contract teacher, one whose employment has extended beyond the probationary years. Contract teachers are normally evaluated on a two year cycle, unless there is some extenuating circumstance or specific issue that needs to be addressed more frequently (TR 348-49). Complainant was scheduled to be evaluated in the spring of 1998 and again in the spring of 2000. The first stage in the evaluation process is “goal setting” (TR 349). During this period, the principal observes the teacher in the classroom, considers the teacher’s professional development, and confers with the teacher in pre and post-observation conferences (TR 349). When the evaluation is complete, the teacher may attach his or her comments (TR 350-51).

the anger that occasionally accompanies that” (RX 15, at 2). Mr. Gelbrich and Complainant signed this evaluation on February 26, 1998. After signing the original evaluation, Complainant became concerned about the evaluation’s references to anger management. She met with Mr. Gelbrich and requested that he remove these portions of her evaluation, and sent him an e-mail outlining her position. In her e-mail, Complainant stated that she felt “as though you have broken your word to me” by including the reference to the anger management class when he had originally stated her attendance would be confidential, and that she “[felt] a bit betrayed” (RX 11). Since she testified that she did not request confidential treatment of her attendance at the conference, this comment is puzzling. Regarding her need to work on anger management, she stated that “the chemical issue” which occurred at Willamette Primary should be irrelevant to Mr. Gelbrich’s present appraisal of her professional conduct. Further, she stated that,

I do not feel that I have a problem resolving conflicts with anyone on this staff except Mary [Renne] and Mary has had a long-standing problem with every colleague she has ever worked with. Mary has a chronic problem

(RX 11). Mr. Gelbrich testified that he did not believe that Ms. Renne had a long-standing problem with all of her colleagues, and that he did not consider Ms. Renne’s level of professionalism to be relevant to Complainant’s evaluation (TR 356).

Complainant wrote a second e-mail regarding her evaluation on March 17, 1998 (RX 12). In this communication, Complainant referred to a past problem in her style of communication with Mr. Gelbrich, stating that

I haven’t always been as gentle as I could have been when challenging your words or actions, but I think that since you pointed out to me how I made you feel when I came on so strong that I have indeed changed and carefully chosen the words and manner in which I bring things to your attention. I have apologized to you for these past actions and I thought they were resolved and past history.

(RX 12). Mr. Gelbrich testified that this e-mail illustrated a behavior pattern that he saw emerging in Complainant, in which she would become upset, communicate in an “angry or judgmental fashion,” allow time to pass, then admit that her reaction was not professional, apologize, and commit to improving her behavior in the future (TR 357-58). Notwithstanding his observations and belief that Complainant needed to work on her professional communication, Mr. Gelbrich removed all specific references to anger management from her 1998 evaluation at Complainant’s insistence. He testified that it was quite unusual to modify an evaluation after it had been prepared (RX 15; TR 360).

Complainant's manner of communication with her colleagues again became an issue the following school year, in the fall of 1998. Mr. Gelbrich had allocated instructional aide time between first grade and kindergarten in a manner that the kindergarten team found unsatisfactory, and in early October Complainant requested that he grant more aide time to kindergarten (RX 17; TR 362). In a series of lengthy e-mails, Complainant told Mr. Gelbrich that she would not be angry with him regardless of his decision, but that she hypothetically could be angry with him for not giving kindergarten more aide time; that she questioned the district's use of funds and its commitment to "putting kids first"; that the district "family is very sick" and "the children in the family become the victims"; and that she was "really struggling with how to maintain my own integrity within a system that has none" (RX 17, at 1-6). Mr. Gelbrich stated that he considered her input, but did not alter the allocation of aide time.

In November 1998, Complainant's communications with the first grade teachers⁶ regarding the use of aide time became more heated. After the first grade team apparently failed to respond to her request to meet, Complainant wrote them an e-mail stating that their lack of response "further supports your continued lack of cooperation and lack of interest in working as a team to do what is best for our students. . . . [T]his behavior is inexcusable and unfortunate. . . . I am very upset with you all" (RX 18). She concluded that, "the children will suffer and quite frankly it is your loss as well" (*id.*). Mary Teel responded on behalf of the first grade teachers, stating that they wanted to meet with the kindergarten teachers during the full staff meeting. Complainant refused this offer, stating that "[m]y professional obligations require that I meet with first grade teachers on a few occasions during the school year. I am not required nor interested in doing any more" (*id.*).

Ms. Frisiras testified that she felt Complainant's communications throughout the fall of 1998 were hurtful and unprofessional (RX 458). Complainant stated that she had become very frustrated with what she considered the first grade teachers' refusal to discuss the division of aide time and possible collaboration between kindergarten and first grade teachers, and initially testified that she did not consider her November e-mails to be unprofessional (TR 762-64, 770, 818). On further examination, however, she acknowledged that some of her words were "hurtful," and that some of her behavior throughout that incident was unprofessional (TR 818).

Regardless of her testimonial defense of her behavior, Complainant had in fact written an apology to the first grade teachers in the spring of 1999 (RX 20). Complainant explained the apology in the context of her application to a position in the first grade which was held by Ms. Himmelright, a temporary teacher. Complainant discussed the possibility of teaching first grade with Mr. Gelbrich in April 1999 when she realized that her all-day kindergarten class might fail to fill for the following year and she would have to teach a half day. Mr. Gelbrich informed the first grade teachers that

⁶ The first grade teachers during the 1998-1999 school year were Christine Frisiras, Mary Teel, Melanie Himmelright, and Susan Leonard (TR 370).

Complainant was interested in teaching their grade, and they responded unfavorably (TR 371, 768). Complainant testified that Mr. Gelbrich told her that the first grade teachers were concerned about e-mails she had sent them that they considered to be “cruel and heartless,” and he suggested she meet with them to address their concerns (TR 768). In fact, the first grade teachers had been so distressed by Complainant’s communications that they had considered filing a union grievance against her, and had discussed the problem with Mr. Gelbrich (TR 465). Complainant testified that she wrote her apology hoping that she could “make things right,” and hoping that the first grade teachers would in turn apologize to her for being unwilling to collaborate. She testified that instead they “attacked” her, accusing her of trying to displace Ms. Himmelright and calling her “malicious, and hateful, and cruel” (TR 773). In this context, she felt that her only option was to tell them they were right and validate their feelings so that they could work together in the future (TR 773-74).

While Complainant may have felt backed into a corner during her meeting with the first grade teachers, she wrote her letter of apology before the meeting, and her feelings of being attacked during the meeting cannot explain the extremely recalcitrant tone of her letter. In the letter, Complainant states

I have said and done many things to all of you that are inexcusable.
I take full responsibility for them and I sincerely apologize. I hold
no bad feelings for any of you in my heart and hope that you can
forgive me. . . . I was especially cruel and heartless in my comments
and messages to you, Christine and I am truly sorry. . . . I would
gladly give up all of my aide time to be able to take back the bad
things I said to you and the other first grade teachers.

(RX 20). Following her meeting with the first grade teachers, Complainant e-mailed Mr. Gelbrich that her meeting went well, and that he had a difficult decision to make regarding which teacher to hire for the first grade position (RX 21). She testified that she did not tell Mr. Gelbrich that the first grade teachers had verbally attacked her during the meeting because she felt it would have been “unprofessional” (TR 775). Mr. Gelbrich stated that he felt Complainant’s post-meeting e-mail to him, in which she stated, “I promise to do my part, both as a professional and as person” was again indicative of her pattern of having an angry outburst followed by reflection, apology, and promise to improve (TR 374). Ultimately, Ms. Himmelright was hired for the first grade position and Complainant remained teaching kindergarten.

Approximately one month after Complainant’s disputes with the first grade teachers were settled, environmental concerns arose at Wilsonville Primary when a ballast broke in a fluorescent light in a classroom. The teacher in that room, Suzanne Lewallen, was conducting a meeting when she heard a loud pop. Shortly thereafter, she noticed a foul smell, and discovered that a thick black liquid substance had exploded over some books and materials on a desk (TR 160). Mr. Gelbrich testified that the amount of fluid was about the size of a pill cap (TR 378). Ms. Lewallen began to wipe the

substance off the books using a tissue, and another teacher immediately informed Mr. Gelbrich of the incident. Mr. Gelbrich sent Joe Simmons, the maintenance director at the school, who told Ms. Lewallen “not to worry about it, it was just tar” (TR 160). Ms. Lewallen remained working in the room that day, but began to feel ill. She still felt sick the next day when she returned to work to discover that the substance had not been removed or the area cleaned (TR 160-61). However, because she knew that Mr. Gelbrich had twice before been informed of leaking ballasts in the school containing polychlorinated bi-phenyl (PCB), she assumed that he had looked into the matter and she could trust the representation that the substance leaking in her room was just tar (TR 161-62). The day after the ballast exploded in her room, another teacher informed Ms. Lewallen that the substance could be harmful, and Ms. Lewallen decided to take a sample for her husband, who “does environmental work,” to test (TR 162). The test results, which she received over the July 4 weekend, revealed that the substance contained PCBs.

Complainant learned of the leak at a June 16, 1999 staff meeting (TR 102). She expressed concern that the chemical could be dangerous to her, as she had chemical sensitivities (TR 106). She also suggested that the school “check into everything else, the asbestos, the water” (TR 108). Complainant reported that Mr. Gelbrich said he would investigate the safety issues surrounding the leaking ballast. Notwithstanding his assurance, Complainant e-mailed the Environmental Protection Agency regarding the leaking ballast later that day. In her e-mail, she stated that “[r]ecently ballasts have been leaking” that contain PCB, although Complainant admitted that she did not know if the ballasts actually contained PCB until July (CX 15, at 1; TR 109-10). Her e-mail continued to state that Respondent was unwilling to replace the ballasts because of the cost, but that “if the District had some financial incentive and/or support perhaps they would make the changes” (CX 15, at 1). She requested information on laws or regulations that would require the District to remove the ballasts, and reiterated her concern for the students’, employees’ and visitors’ safety (CX 15). Complainant testified that she contacted the EPA rather than waiting for Mr. Gelbrich to look into the problem because she did not trust the school to “do the right thing” and “I felt as though I needed to take a more aggressive approach just to make sure people were safe” (TR 108). In pursuing this approach, Complainant asked Mr. Gelbrich to test the ballasts in her classroom to see if they contained PCBs. She testified that Mr. Gelbrich told her he checked the ballasts and they did not contain PCBs (TR 118). However, because she did not trust his response, Complainant asked the building custodians and the EPA to check the ballasts. She testified that both confirmed that the ballasts contained PCBs (TR 118).

After Ms. Lewallen received the test results revealing PCBs, Bruce Long, an investigator with the United States Environmental Protection Agency, arranged to visit the school. Mr. Gelbrich e-mailed Dr. Stickney prior to this visit (CX 16). He informed her that he had invited Ms. Lewallen to join in the inspection, but clarified that she “is not the person who contacted Bruce, but was called by Bruce and was asked questions” (CX 16). In her reply, Dr. Stickney seemed most immediately concerned with why a teacher would contact the EPA, opening her e-mail by asking Mr. Gelbrich if he had informed the staff that the district was changing the ballasts, and stating that Mr. Long’s inspection

was “curious if you indeed had already communicated that message” (CX 16). Dr. Stickney contacted Mr. Simmons soon after she discovered that the EPA would be visiting the school, and instructed him to contact Three Rivers Environmental to test the PCB levels in the classrooms (CX 17). She stated that “there is considerable faculty concern – rising to the level of panic” and that the school needed to either produce “evidence” to prove that the school was safe or promptly resolve any safety issues that in fact existed (CX 17).

Mr. Long visited the school in mid-July. He tested areas of the school for PCB contamination (TR 381), and discussed the problem with Mr. Gelbrich. Mr. Gelbrich testified that Mr. Long specifically told him not to notify the staff regarding the potential hazards until the test results were returned (TR 382). Mr. Gelbrich reported that he received tests results later in July, although the school did not receive complete test results until September 20 (CX 31; CX 32; CX 33). After receiving the July results, Respondent began removing all PCB-containing ballasts and decided to hold a meeting to disseminate information to the staff (TR 384).

Respondent held two meetings in August to disseminate information. The first was held on August 5, and was open to the public. Representatives from the EPA and Oregon Department of Environmental Quality attended the meeting, and there was some press coverage (TR 115). At this meeting, Ms. Frisiras expressed that she and other teachers were losing trust in Mr. Gelbrich, and Complainant echoed the statement (TR 116-18, 451). During the meeting people were standing to speak. Complainant and Ms. Lewallen testified that at one point, Dr. Roger Woehl, the school district superintendent, told Complainant to sit down while she was speaking, and repeated this three times (TR 119, 175-76). Dr. Woehl testified that he did not tell Complainant to sit, and Dr. Stickney and Mr. Gelbrich testified that they did not hear him tell Complainant to sit (TR 387, 516). Toward the end of the month, on August 25, Respondent held two additional meetings regarding the safety of the school, both of which Complainant attended. The first was held in the morning for the staff, and the second was held in the evening and was open to parents (TR 128). A representative from the EPA was also present at the evening meeting (TR 600). At the first meeting, Complainant informed Mr. Gelbrich that several teachers had asked Dr. Scott, a toxicologist, to speak for them, and requested that Dr. Scott sit on the panel at the evening meeting (TR 129). Complainant testified that Dr. Woehl did not allow Dr. Scott to sit on the panel in the evening meeting, but she addressed questions to him (TR 130). Complainant also spoke frequently at the meeting, and testified that she repeated the question, “[w]ho’s going to protect the children?” . . . at least ten times” (TR 130).

Claimant’s fears regarding who was going to protect the children and staff were evident in her August e-mail communications with Mr. Gelbrich. She expanded her areas of environmental concern to include air quality, water, lead and asbestos hazards in the school (CX 22, at 2). Following the August 5 meeting, Complainant e-mailed Mr. Gelbrich, telling him she felt “betrayed” that he said there were no PCBs in her section of the building (CX 24, at 1). She further stated that before she would re-enter the building, “I will want to see the clean up plan and tests from all of these areas” and that she

needed to be consulted in the event that any carpet needed to be replaced, as she had chemical sensitivities to some carpet adhesives. She concluded this e-mail by telling Mr. Gelbrich she was “so disappointed in [him],” that his actions indicated that he did not care about the safety of herself and others, and that she needed to “take whatever action is necessary” to assure safety in her work area (CX 24, at 2).

Respondent in fact decided to replace all the carpets in the school (TR 522). It was mindful of the adhesives used so as not to irritate Complainant’s chemical sensitivities (CX 29, at 1). However, Mr. Gelbrich apparently failed to respond to a series of e-mails from Complainant regarding the carpet installation, and Complainant became upset that Respondent had not actively involved her in the carpeting process. She expressed this in an August 29 e-mail to Mr. Gelbrich, and further stated that she would not meet with him without “representation” because she no longer trusted him. She credited her evolving distrust to his lack of communication, a meeting location being changed to Jane Stickney’s office, and the fact that a maintenance person had responded to her on an issue rather than Mr. Gelbrich responding (CX 29, at 2). In closing, Complainant advised Mr. Gelbrich that

I appreciate your desire to follow the guidelines set up by the EPA.
I would hope that the district would ultimately do what is morally
and ethically the right thing to do even if the EPA guidelines are
not specific about every issue involved [I]n my opinion, by
not honoring all of my requests, you have not assured everyone’s
health and safety.

(CX 29, at 2). Complainant explained at the hearing that she believed the district needed to go “beyond the EPA guidelines” to ensure the school’s safety (TR 125).

In fact, Respondent did go beyond the EPA guidelines in several respects. Dr. Stickney testified that the EPA had not instructed the district to replace all of the carpet, but it chose to do so to assure that the environment was safe and the staff and parents trusted that it was so (TR 522). Respondent also had Three Rivers Environmental wash “every surface in that school” several times (TR 522). Dr. Stickney claimed that the EPA had told her the school was “probably cleaner than any school in Oregon” by the time the new school year was about to begin (TR 523). Still, as expressed in her August 29 e-mail, Complainant had lost her faith in the district’s honesty regarding the school’s safety, and did not deem the EPA guidelines sufficient to ensure safety.

In early September, Complainant again e-mailed Mr. Gelbrich requesting to see the Three Rivers test results regarding PCB, lead and asbestos contamination (TR 126). In her e-mail, Complainant also requested that the ceiling in her classroom be tested for the presence of asbestos if that had not yet been done (CX 31). Perhaps in response, Mr. Gelbrich requested a copy of the final

EPA test results from Dr. Woehl, but was informed that the district had not yet received them (CX 32). Complainant reiterated her request in a September 20 e-mail (CX 33, at 2). Mr. Gelbrich again told her that the final test results were not yet available, but he had a binder in his office containing any information he had received, which she was welcome to view. The next day, Mr. Long mailed Mr. Gelbrich the final test results (CX 100). Complainant was listed as a “cc” on the letter, a fact that troubled her because she had asked Mr. Long to keep her communications with him confidential (TR 132-33). Mr. Gelbrich testified that he did not take particular notice of her name on the letter, and that it did not indicate to him that she had filed a complaint with the EPA (TR 397).

Several days later, on September 23, the ceiling in Complainant’s classroom was inspected for asbestos by representatives from the EPA and DEQ, in compliance with Complainant’s request (TR 133-34). Mr. Gelbrich had informed Complainant of the inspection earlier that day, and had told her that she needed to move the children from the room while the ceiling was inspected (TR 135). She stated that he also told her that she “needed to come to him with these kinds of concerns rather than go to government agencies” (TR 135), a sentiment which Marcia Clark, the school’s guidance counselor, testified he reiterated to Complainant in front her later that day (TR 606). Complainant testified that, when Mr. Gelbrich came to her classroom to inform her of the inspection, he was accompanied by his secretary, Beverly Johnson (TR 135). Complainant stated that it was unusual for Mr. Gelbrich to have his secretary accompany him when visiting a teacher’s classroom, and she was troubled by it (TR 135).

Complainant testified that she was not invited to participate in the inspection of her room, but she saw the men walking toward her classroom and ran down the hall to join them (TR 139; CX 36). After the inspection, she sent Mr. Gelbrich another e-mail again expressing dissatisfaction with the district’s handling of her environmental concerns. She asked for the identities of the people inspecting the classroom because, although Mr. Gelbrich had introduced her, it was “not enough,” and she wanted their business cards. Further, she stated that she did not trust Three Rivers because their employee had told her there was no asbestos problem in her room (CX 34). She went on to state that

the more I think about this, the more upset I get. I have asked about the asbestos several times and everyone keeps saying its fine; no problem; clean. There is no excuse for what has happened in my room. A competent asbestos person would walk in there and see the problem in a minute.

(CX 34). It is somewhat unclear what problem Complainant expected “a competent asbestos person” to see (CX 48).⁷ However, the OSHA inspectors found no airborne asbestos, according to Mr.

⁷ Claimant testified that her ceiling was different from other ceilings in the building, and that she later discovered it was a “popcorn” ceiling. This is presumably the difference she saw.

Gelbrich, and in fact only found a small amount of asbestos residue on a shelf.⁸ They offered a range of cleanup options for Respondent, from using a HEPA vac and wipedown procedure to complete removal of the material (TR 393). The district decided to remove the asbestos from Complainant's room. However, the following day, on September 24, Complainant twice e-mailed Mr. Gelbrich regarding the extent of the cleanup, stating that he had promised her that he would remove all of the asbestos in her room, but she discovered he did not in fact intend to do so (CX 35). She repeatedly accused him of lying to her, and demanded 100% removal of all substances containing asbestos in her classroom (CX 35, at 2). She further stated,

I insist on being involved in the cleanup process and decision making regarding the clean up and asbestos removal in my room. . . . I do not wish to be difficult, but you must realize that my health is at stake and I do not trust you or anyone in the district to take care of this properly. . . . I do not believe our building is safe. It isn't. Where else are there dangers lurking in our building and we are not being told. Darren [Lee]⁹ told me my ceiling did not contain asbestos. If he came out here he could easily see that not only does it contain asbestos, it is friable and deteriorating badly. Even to the untrained eye that is obvious. . . . I respect your position as my principal, however I must insist on being totally involved in this process as I have said above.

(CX 36, at 1).

Mr. Gelbrich responded to her e-mails, stating "[y]our continued accusations and characterizations of my integrity are, again, noted" (CX 39, at 1). He told her that he had only been aware of the textured ceiling material in her classroom, and that he would research any other possible asbestos-containing areas and determine how to address the problems as he became aware of them. He went on to state, "[t]he decision relative to abatement or containment is made by the district. While your *input* is welcome, the district makes the decision" (CX 39, at 1). Mr. Gelbrich testified that he understood Complainant to want not just involvement, but oversight and final approval of how the

⁸ However, the EPA also found that Respondent did not inspect the building, maintain adequate records of asbestos activities, conduct periodic monitoring of asbestos, or notify parents and employees of an asbestos management plan, among other violations, and issued a Notice of Noncompliance and an Administrative Complaint seeking \$16,500 in civil penalties against the district (CX 48).

⁹ Darren Lee was an employee of Three Rivers.

school would address any asbestos present, and he was unwilling to grant her this level of control (TR 394-95). However, he testified that he listened to her input and followed many of her suggestions, which resulted in the school making clean-up efforts beyond any environmental agency's regulations (TR 395).

Also in September, Claimant and Mr. Gelbrich revisited the issue of division of aide time for the fourth consecutive year. Mr. Gelbrich had sent the kindergarten teachers an e-mail stating that he was adding three hours of aide time for the kindergarten team, and stating that the "additional time is intended to promote our concerted effort to develop essential literacy skills--the foundation for their future success--and should be used toward that end" (RX 22). However, Complainant represented that several days later Mr. Gelbrich had assigned the kindergarten instructional aides to lunch duty. She e-mailed him about this discrepancy, stating that by assigning the aides to lunch without telling the teachers, he was actually taking the total amount of aide time away from the kindergarten teachers, dictating the aide schedule, and not using the three hours for instructional time as he had stated it was to be used (RX 23). She concluded by saying, "[m]aking a promise and then changing your mind like this is one of the reasons why many of your teachers do not trust you. . . . There is no integrity in breaking a promise. There is no integrity in going to the aides after Mary and I go home and telling them instead of the teachers involved" (RX 23). Complainant e-mailed him a follow up message the next morning (RX 24). She again told him that his actions had no integrity, and stated, "[y]ou do this to people all the time and each time we have seen how it puts people at odds with each other and causes bad feelings, causing division and dissension, not edification of our staff. I have shared my feelings on the [way] you have done this in the past and you did not listen. I hope we won't have to go through it again" (RX 24). The record does not indicate that Mr. Gelbrich ever settled this matter to Complainant's satisfaction.

Mr. Gelbrich testified that he had felt that many of Complainant's communications to him during fall 1999 were inappropriate and unprofessional (TR 401, 405). He stated that he had even recommended a book to her to address behavior patterns that cause problems in working relationships (TR 405). Nevertheless, he felt that she increasingly perceived his words and actions as untruthful, regardless of the subject matter (TR 406). He testified that he had never misrepresented facts or lied to Complainant (TR 406). He further testified that, based on repeated and increasing communication problems that he perceived in Complainant, he decided to address the issue in the evaluation process that year (TR 415).

In late October, Mr. Gelbrich and Complainant met to discuss her goals for the next evaluation cycle. These goals were to become part of her spring 2000 evaluation. At the hearing, Mr. Gelbrich explained that goal setting was part of "the continued supervision and evaluation process," and that teachers wrote professional goals regarding "their focus for their own professional development" (TR 408). He further testified that principals or supervisors would occasionally provide input in the development of these goals (TR 408). At Complainant's request, Ms. Frisiras attended the meeting in her capacity of union representative to take notes. During her fall 1999 goal setting conference, Mr.

Gelbrich stated that he wanted Complainant to include “communicating consistently in a professional manner” in her goals (TR 413), and indicated that he would incorporate the goal himself if she did not (TR 414). Several days later, Complainant sent Mr. Gelbrich an e-mail requesting that he clarify this goal. She asked him to provide examples of “exactly what you observed that would indicate that I have not communicated in a professional manner. Please define consistently too” (RX 25). Additionally, Complainant noted that Mr. Gelbrich had specifically referenced her 1994-95 conflict with Ms. McCarney regarding environmental concerns at that school, and asked what percentage of her unprofessional communication involved the PCB spill and other chemical issues at the school since June (RX 25).

Respondent indicated that it questioned the sincerity of Complainant’s confusion regarding the definition of “communicating consistently in a professional manner,” as Mr. Gelbrich had used these words in conversations with Complainant in past years, particularly in reference to her conflicts with Ms. Renne. *See Respondent’s Post-Hearing Brief*, at 6. Still, Mr. Gelbrich attempted to address Complainant’s questions in a letter dated November 8, 1999 (RX 26). He stated that he wanted her to write the professional goal herself or he would “direct you to do so in a guided plan for professional growth” (RX 26). He referred her to the district’s Evaluation Handbook, which had been updated that fall. He also enumerated examples of her unprofessional communication, listing “the manner in which you handled issues at Willamette Primary”; her conflict with Ms. Renne in which she stated she was unwilling to continue their working and personal relationships and challenged her colleague’s professional competence, “necessitating a meeting where we reviewed the relevant standard [for professional communication] . . . in the then applicable ‘Evaluation Handbook’ ”; her conflicts with the first grade teachers in 1998; and her behavior toward him regarding aide time that fall (RX 26). Finally, he addressed her actions surrounding environmental hazards. He stated that her concerns were valid and her suggestions were helpful, but that her “demeanor and tone have vacillated between calm inquiry and angry outbursts, sometimes within the same meeting. Had the events of the summer not occurred, I would still be encouraging you to improve in this area” (RX 26).

On November 15, Complainant submitted revised goals to Mr. Gelbrich, still omitting any reference to professional communication. In accordance with the district’s handbook on professional growth, Mr. Gelbrich scheduled a meeting with Complainant to structure a professional growth plan addressing the goals Complainant had written as well as the goal Mr. Gelbrich had written for her, which was labeled Goal Three, and specifically indicated that it was “directed by the principal” (RX 27). Goal Three instructed Complainant to “communicate consistently in a professional manner in all aspects of professional work” (RX 28). On December 15, 1999—the same day that she filed her complaint in this matter – Complainant met with Mr. Gelbrich and signed the goal. Complainant testified that she did not indicate that she agreed with the goal by signing it (TR 254). She further testified that, prior to the meeting, Mr. Gelbrich had informed her that a representative from the

administrative building would be present at the meeting, although he did not tell her who it would be.¹⁰ Complainant then asked Mr. Smith to accompany her as a union representative, and asked Ms. Clark to attend the meeting to take notes (TR 256). Ms. Frisiras testified that she had withdrawn from representing Complainant because she did not agree with Complainant's position, and believed that Complainant needed to work on her professional communication (TR 470-71). She further testified that she believed Complainant was trying to force Mr. Gelbrich to discipline her to aid her lawsuit (TR 470-71).

Almost a month after signing Goal Three, Complainant e-mailed Mr. Gelbrich expressing concern over the characterization of the goal as a "Collaborative Plan" rather than a "Guided Plan" or "Plan of Assistance" (RX 29). Mr. Gelbrich responded a week later, stating that it was not his choice to place her on a Guided Plan, but that he was developing one based on her request that he do so (RX 30). Complainant responded that she was "amazed and distressed" that he indicated that she was self-selecting a Guided Plan, and stated that the very nature of a goal that he directed her to work toward could not be collaborative, because she had clearly voiced her disagreement with it (RX 31). Mr. Gelbrich did not agree with her interpretation of the handbook (TR 421). Dr. Stickney testified that Complainant was never actually placed on the Guided Plan, that Complainant could not have lost her job for failing to meet the requirements of Goal Three, and that giving an employee a Directed Goal was not considered a disciplinary action (TR 541, 545-46).

Mr. Gelbrich eventually completed Complainant's evaluation on March 15, 2000 (RX 32). He stated that she had made progress on all three of her professional goals, and particularly complimented her progress on Goal Three (*id.*). Further, he stated that Complainant had worked "countless hours" to preserve and improve her all-day kindergarten program, and that the effort was "greatly appreciated" (*id.*). He also praised her "high expectations for her students' academic performance" and concluded that "it is a pleasure to recommend an extension of her contract" (*id.*). Mr. Gelbrich testified that he intended this to be a positive evaluation (TR 423). However, Complainant contends that it was less favorable than her past evaluations, and was in fact a negative evaluation. At the hearing, she took issue with the narrative format, which was different from past evaluations, and stated that the evaluation actually included negative sentiments couched in a positive light (TR 273). She stated that the evaluation indicated that the all-day kindergarten could not continue without her recruitment efforts, when in fact she had built the program up over the past several years to the point that she no longer needed to recruit for it (TR 274).¹¹ In addition, the evaluation stated, "[h]er instruction is organized and her classroom is typically orderly (so much as kindergarten will allow!)" (RX 32, at 2). Complainant

¹⁰ Dr. Stickney attended the meeting, but did not participate significantly (TR 257).

¹¹ Yet it must be pointed out that Complainant testified she became interested in moving up to first grade for the 1999-2000 school year because she was unsure that the all-day kindergarten would fill up (TR 765).

testified that Mr. Gelbrich had observed her classroom on the 100th day celebration of the school, which she felt was not an accurate indication of her typical organization (TR 276). She also felt that his reference to the busy atmosphere of her classroom, if read “between the lines,” could indicate that her classroom management skills were lacking (TR 277).

Finally, Complainant was unhappy with Mr. Gelbrich’s reference to Goal Three. She protested that he had directly addressed Goal Three “in terms of progress,” asserting that “he’d promised that he would not mention that directly. . . . [H]e was trying to assure me that he would play down that aspect of his goals for me” (TR 276-77). She maintained that his stating that “[h]er principal is not aware of *any* situation occurring, after her goals were established, in which her communication was anything but professional” (RX 32, at 102), “[raised] a big red flag that there has been a grave concern over professional communication” and indicated that the problem had been ongoing (TR 278). Complainant maintained that Mr. Gelbrich’s comments on her improved communication skills were inaccurate because she had never had a problem with communication, there was nothing to change in her behavior, and she acted no differently in her professional communications before and after Goal Three was implemented (TR 279). Ms. Clark testified that she observed no changes in Complainant’s professional demeanor before and after Goal Three (TR 639).

Several weeks after Complainant received her evaluation, she again became involved in a conflict with her fellow teachers, this time surrounding her and Ms. Clark’s environmental activism. Ms. Clark had been speaking to the media and writing articles about the environmental hazards she perceived in the school. Among her activities, she had written an article that appeared in a local newspaper, and was also apparently the subject of a television news report on April 4, 2000.¹² The following morning, Lisa Terrall, a fourth grade teacher at Wilsonville Primary, sent an e-mail to the certified staff¹³ expressing frustration over some faculty’s communication regarding their environmental activity. Ms. Terrall stated, “I am hurt by the way I see our school being drug through the mud on TV lately. . . . I don’t like waking up to see our school slammed in the news without my knowledge that there was even a problem” (CX 75). She requested that staff communicate with each other more diligently so that she could have information to give parents when they contacted her about the school’s alleged environmental problems. In addition, she asserted that the publicity was hurting the school, and stated, “that makes me angry!!” She concluded by requesting the staff to “do a better job of communicating and taking care of things IN-HOUSE before using the media to wage a war on the

¹² Ms. Clark had written an article regarding a pesticide spraying at Wilsonville Primary that had taken place over President’s Day weekend. She testified that she had “an adverse reaction” to the spraying, and was concerned that most of the teachers and none of the parents had been informed of the sprayings before they occurred (TR 620-21).

¹³ This included all certified teachers and administrators in the school.

administration” (CX 75).

When they received this e-mail, several of the teachers sent messages to the certified staff echoing Ms. Terrall’s sentiments, and encouraging other teachers to “flood our mailboxes with more piggybacks!” (CX 79). Most messages focused on the academic excellence of the school, complained that the media attention caused an unwarranted negative public perception of the school, and asked that the teachers discuss the matter further so “the ‘true’ voice of Wilsonville Primary School may be heard” (CX 80). In addition, Mr. Gelbrich sent Ms. Terrall a reply to her initial e-mail, explaining the nature of the specific environmental problem featured on the news report and stating that he shared her frustration (CX 77). Additionally, he stated that he had chosen not to respond to each allegation of impropriety, “because I believe them to be unfounded by fact and because, frankly, I don’t want to give them any more credence” (CX 77). Ms. Terrall e-mailed him back, stating “I am so frustrated about these whistleblowers and the biased positions they put out there as truth” and that the whistleblowers should only go to the media “as a last resort rather than a smear campaign against you and Roger [Woehl]” (CX 77). Mr. Gelbrich testified that he did not believe that Ms. Clark and Complainant were conducting a smear campaign against him, but he did not express this to Ms. Terrall. Further, he testified that Ms. Terrall’s e-mail communications were generally appropriate and professional (318-19, 443).

Although they were not named directly, Complainant and Ms. Clark believed, correctly, that the e-mails referred to their activities. Complainant e-mailed Mr. Gelbrich about the e-mails on April 7, stating that, “[a]s our leader, in my opinion, it was your responsibility to intercede and nip this in the bud before it got this far. . . . Lashing out at a colleague publicly and then inviting others on the staff to join in is certainly in direct opposition to our staff agreement¹⁴ and probably a grievable offense. . . . In my opinion, letting this continue is an abuse of power on your part. . . . I am disappointed and outraged” (CX 85). Complainant also spoke with Ms. Terrall, telling her that she was not comfortable with Ms. Terrall’s daughter enrolling in her kindergarten class because she felt she would be unable to have a healthy parent-teacher relationship with Ms. Terrall (TR 497, 887-89). Ms. Clark wrote Mr. Gelbrich an e-mail stating that the staff tensions were largely based on a lack of information, and suggesting that he contact the EPA and Department of Agriculture, which was investigating the school regarding the use of pesticides, and invite their employee experts to share their findings with the staff (CX 86). Mr. Gelbrich did not organize such a meeting, but addressed the staff in an e-mail of his own. He instructed the staff to express their concerns directly with one another and to remain professional in all communications, but stated that he was not scheduling a staff meeting to address the issues (CX 87).

Notwithstanding Mr. Gelbrich’s decision, the building representatives organized a meeting to discuss the issues surrounding statutory protection of whistleblowers based on an alleged threat by Ms.

¹⁴ The staff had signed a “Building Agreement” in the fall of 1999 in which they agreed to communicate directly with one another if they had disagreements (TR 625-26).

Clark to Ms. Terrall (TR 493-94). Mr. Bailey, the union president, conducted the meeting. All of the school's teaching staff were invited (TR 494). In addition, Joseph Montalbano, the school's Instructional Coordinator, attended the meeting (TR 221). Although Respondent denied that Mr. Montalbano was an administrative employee, his office was in the administrative area of the school and he had been acting principal when Mr. Gelbrich was away from the school (TR 218). Both Ms. Clark and Complainant were invited to the meeting, but neither were able to attend, although Ms. Clark requested that Mr. Bailey reschedule the meeting (TR 495). Ms. Terrall testified that people expressed frustration at the meeting because "a couple of people were getting to say everything, and the rest of us had to stay quiet" (TR 495-96). Mr. Bailey testified that at the outset he made clear that he would repeat the meeting's contents to Ms. Clark and that the meeting was not a forum to "take potshots" at specific staff members (TR 723). He stated that people were frustrated at the meeting, but remained professional (TR 723). Ms. Lewallen testified very differently about the meeting, however, describing it as a "lynch mob" (TR 189). She stated that people complained that Ms. Clark was no longer doing her job, and that just because one or two people had chemical sensitivities that did not mean that everyone should have to deal with the repercussions (TR 187). She stated that several people's comments got progressively "vicious and more harsh," but that Mr. Montalbano did not tell anyone to calm down (TR 189).

Soon after this meeting, Mr. Montalbano wrote a letter to the local newspaper, which was published in mid-April (CX 95). Ms. Lewallen testified that some staff had discussed writing this letter at the meeting earlier that month (TR 188), although Mr. Montalbano did not seek input from other staff in writing the letter. The letter was titled, "Extremists don't represent school staff" (CX 95). The letter stated that the majority of the staff felt that "our school is being held hostage by a couple of staff members who have unreasonably high sensitivity to environmental issues" (CX 95). He stated that the staff valued the "extremists' " right to communicate their concerns, but vehemently disagreed with their choice to report to the media rather than use the "normal channels" within the district (CX 95). He then proceeded to highlight the positive aspects of Wilsonville Primary, focusing on academic achievement and praising Mr. Gelbrich's leadership. The letter did not mention either Ms. Clark or Complainant by name, although Mr. Montalbano testified that he was referring to them (TR 221). Mr. Montalbano added that Mr. Gelbrich, Dr. Stickney and Dr. Woehl all reacted positively to the letter (TR 222-23). However, Complainant did not react positively, and sent him an e-mail that he regarded as unprofessional and disrespectful (TR 223). In it, she told him she was "deeply saddened" about the meeting and subsequent letter, that she felt referring to her and Ms. Clark as extremists was "name-calling and being judgmental," and that he had probably "done irreparable damage to our school" (CX 97). She pointed out that he had never come to her directly to discover what procedures she had followed in making her environmental complaints, and stated, "[y]our lack of integrity, honesty and empathy in this situation astonishes me" (CX 97).

Mr. Gelbrich testified that he did not interfere with the staff's e-mails because he felt it was neither his right nor his responsibility (TR 425). Rather, he allowed the teachers to communicate their

concerns, but reminded them to remain respectful and professional (TR 427). Further, he found nothing defamatory or incendiary about the staff e-mails, so felt no need to discipline the senders (TR 426). Additionally, Dr. Stickney testified that she frequently spoke with Mr. Gelbrich regarding the teachers' continuing professionalism, "even though it . . . was tense between people" (TR 558), and that they had agreed that he should "respect every voice and allow voices to speak in the collegial professional environment" (TR 558). Further, Dr. Woehl stated that he believed that he would stifle the staff's freedom of speech if he interfered with their e-mails (TR 963).

Regardless of Respondent's asserted reasons for allowing the teachers' e-mails and other communications to continue, Complainant testified that she felt she had been exposed to a hostile work environment, which had begun earlier that fall and continued through April. She stated that in the fall of 1999 she had begun seeing a psychological counselor for her feelings of "pain and anxiety" over her deteriorating relationship with Mr. Gelbrich and his imposition of Goal Three, and returned to the counselor after the staff e-mails in April 2000 (TR 778). Near the end of the school year, she decided that she could not return to teaching at Wilsonville Primary. She testified that because of the "hostility in the environment from my colleagues, from the principal,"¹⁵ (TR 776), she dreaded going to work, and "couldn't even drive by the building without getting sick" (TR 780). Further, she was so "emotionally exhausted" that she could not put in more than the minimum number of hours required (TR 776). Complainant requested a transfer to Cedaroak Primary late in the school year, and Respondent removed another employee to accommodate her transfer (TR 891).

At the time of the hearing, Complainant was still employed at Cedaroak. She had requested an evaluation by her new principal, Sharon Newman, which was given, even though Complainant would not normally be evaluated that year. Dr. Stickney agreed to remove Complainant's goals set by Mr. Gelbrich and to have her essentially start over with a new evaluation at her new school (TR 925). She testified that Complainant showed no apparent distress when she offered this (TR 927), but Complainant e-mailed Ms. Newman soon afterwards, stating that she was "distressed" about her evaluation and goal setting process. Complainant wanted Goal Three to remain in place because she wanted to "[honor] the evaluation document as it was written," (RX 45) and resented the administration stating that she was *choosing* to keep the goal in place. She stated that "I believe your actions, and [Dr. Stickney's] are discriminatory" (*id.*). As in her communications with Mr. Gelbrich, she stated she would no longer meet with Ms. Newman without representation present (*id.*). Complainant submitted a draft of her new evaluation into evidence (CX 102). The evaluation stated that Complainant chose to keep all three goals in place from the previous year, but gave an entirely positive assessment of Complainant's work at her new school (*id.*).

¹⁵ Mr. Gelbrich had in fact left Wilsonville Primary to become a Director of Student Achievement for the Portland, Oregon Public Schools before Complainant requested her transfer (TR 329, 429).

2. Allegations of Discrimination against Other Whistleblowers

In addition to the evidence of discrimination against herself, Complainant presented the testimony of Ms. Lewallen and Ms. Clark, who claimed they had also been discriminated against for their whistleblowing activities. As established previously, both women had been vocal during the summer of 1999 regarding their environmental concerns, and Respondent was aware of their advocacy.

Ms. Lewallen testified that Respondent had retaliated against her for her environmental activities in several ways. First, she stated that Mr. Gelbrich stopped consulting her on school-related issues, and no longer asked her to act as principal in his absence (TR 180). She was a member of the Child Advisory Study Team, or CAST, and testified that Peter Oliver, the school psychologist (TR 631), stopped inviting her to meetings (TR 180-81). Mr. Oliver later told Ms. Clark that he had “very strong feelings” opposing her approach to environmental activism (CX 83). She also felt that Dr. Stickney had retaliated against her by discontinuing the monthly Title 1 meetings and removing her from the Title 1 migrant program (TR 181-82). In addition, Ms. Lewallen testified that in mid-July 1999 she had a lengthy conversation with Mr. Gelbrich asking him to be “proactive” about the environmental concerns and to shut down the school temporarily, and that Mr. Gelbrich told her, “if you ever want to be an administrator, you need to think like an administrator here” (TR 182-83). She interpreted his comment to mean she should back off of her environmental activism. She also believed that this comment meant that she would not be considered for the instructional coordinator position that was soon opening, and which she had discussed with Mr. Gelbrich. Around the same time, Dr. Stickney informed her of a distinguished educator position with the Department of Education, which made Ms. Lewallen believe that Respondent wanted to push her out of the district. However, Ms. Lewallen ultimately conceded that her perception of retaliation may have been mistaken (TR 208).

Regarding the Title 1 meetings, Dr. Stickney testified that changing staff and teaching arrangements at other district schools made the meetings less relevant, and they were held less frequently as a result (TR 524-25). She also stated that she recommended job openings to Ms. Lewallen because she respected her and had faith in her teaching abilities (TR 528). Further, she asserted that she had no information suggesting that Ms. Lewallen was intentionally excluded from CAST meetings, and that Ms. Lewallen was not a standing member of the team, but only present when a Title 1 child was discussed (TR 529). Regarding the instructional coordinator position, Dr. Stickney testified that Ms. Lewallen did not apply (TR 530).

Ms. Clark also testified that Respondent retaliated against her for her whistleblowing activities, and filed a complaint with OSHA in May 2000 (TR 623-24). She stated that she also experienced a hostile work environment, citing the April 2000 e-mails and staff meeting (TR 627). Further, she testified that she had a reduced performance evaluation; that her job duties were changed, which made it difficult to complete her work; and that Mr. Gelbrich told her she would have to take personal or business leave to attend an OSHA meeting (TR 624-25). In addition, she stated that Mr. Gelbrich had

withheld the files of several students from her (TR 625). She was particularly critical of Mr. Gelbrich's handling of the April 2000 e-mail exchanges which she felt created a hostile work environment. Ultimately, Ms. Clark resigned from her position and found alternative employment (TR 575).

On the other hand, the record also contains the testimony of Ms. Frisiras regarding remarks she made at a public meeting in the summer of 1999 where the PCB spill was being addressed. Ms. Frisiras stated at that meeting that people had become frightened and would have trouble trusting Mr. Gelbrich because of his handling of the PCB incident. Ms. Frisiras testified that she was not disciplined or subject to any adverse action as a result of her remarks at that meeting (TR 447-54).

B. Discussion

Under the Toxic Substances Control Act:

[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has—

- (1) commenced, caused to be commenced, or is about to commence a proceeding under this chapter;
- (2) testified or is about to testify in any such proceedings;
- (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

15 U.S.C. § 2622 (a) (1997).

To prevail in her case, Complainant must establish that: (1) she engaged in an activity protected under the Act; (2) Respondent was aware of her protected activity; (3) she was subsequently subjected to an adverse action by Respondent; and (4) the adverse employment action was motivated, in whole or in part, by Complainant's protected activity. *See Dartey v. Zack*, 82-ERA-2 (1983); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). If Complainant is successful in establishing these elements, the burden shifts to Respondent to produce evidence that the adverse action was motivated by a legitimate, non-discriminatory reason. *See Guttman v. Passaic Valley Sewer Comm'rs*, 85-WPC-2 (1992), *aff'd. sub nom, Passaic Valley Sewer Comm'rs v. Department of Labor*, 992 F.2d 474 (3d. Cir.), *cert. denied*, 510 U.S. 964 (1993). If Respondent is successful, Complainant must prove that the asserted reason for taking the adverse action is not the true reason, but rather is a pretext for retaliation. *See Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Complainant contends that she engaged in protected activity when she contacted government agencies regarding potential environmental hazards at the school; that Respondent was aware that she engaged in this activity at least by September 1999, when a letter from an EPA employee to the district listed her as receiving a copy (CX 100); and that Respondent retaliated against her by issuing “verbal and written admonitions and warnings” regarding her activities, by implementing Goal Three, by giving her a reduced performance evaluation, and by creating a hostile work environment. *See Complainant’s Post Hearing Brief*, at 24. Respondent concedes that Complainant engaged in protected activity, but denies that it was aware of the activity or that it took any adverse action against Complainant as a result of her activity.

The genesis of this case undoubtably lies in the Complainants’ refusal to admit, to herself or others, that she has a problem communicating with other people. As she stated:

I don’t believe I have problem with communication, nor have I ever had a problem with communication

(TR 279). If Complainant does not have a communication problem, then it would not be unreasonable to conclude that Goal Three was punitive, and it would make sense to Complainant to blame the imposition of Goal Three on her whistleblowing activities. However, had Complainant accepted what is readily apparent – that she has a great deal of difficulty in her interpersonal relationships with both her supervisors and colleagues – she would never have brought this case.

a. Employer’s Knowledge of Protected Activity

I reject Respondent’s contention that it was unaware of Complainant’s protected activity. Mr. Gelbrich testified that he neither knew that Complainant had contacted any government agencies nor cared that she did so (TR 304). However, Drs. Woehl and Stickney contradicted his claims. Dr. Woehl stated that, at the outset of the EPA investigation, Mr. Gelbrich “indicated that he thought one of – one or more people had made some type of a complaint to the EPA” and that Complainant was among the people he believed had made the complaint (TR 959). Further, Dr. Stickney testified that she remembered Mr. Gelbrich telling her that Sue Lewallen “may have been the person who called” the EPA (TR 553). He apparently felt the identity of the person reporting to the EPA was significant enough for him to note, in an e-mail to Dr. Stickney “that his speculation was not correct” regarding the person’s identity (TR 553; CX 16). Further, as Respondent itself notes in its post-hearing brief, it was aware that some of its staff members were very concerned regarding the environmental issues at the school, and Complainant had been vocal throughout the entire summer of 1999 in environmental meetings. Based on this evidence, there can be little doubt that Respondent was aware of Complainant’s protected activity.

b. Adverse Action Taken Against Employee

Having shown that she engaged in protected activity and that Respondent was aware of this activity, Complainant must next establish that Respondent took an adverse action against her. To be adverse, the employment action at issue must have some “tangible job consequence.” *Shelton v. Oak Ridge National Laboratories*, ARB No. 98-100, ALJ No. 1995-CAA-19 (ARB Mar. 30, 2001). Mere negative feedback or “unwelcome day-to-day critiques” are not adverse actions. *See id.*, at 8, quoting *Davis v. Town of Lake Park*, 245 F.3d 1232 (11th Cir. 2001).

First, Complainant asserts that Respondent took an adverse action against her through Dr. Woehl’s and Mr. Gelbrich’s “verbal admonitions and warnings.” Specifically, Complainant contends that Dr. Woehl told her to sit down at the August 5 meeting (TR 119). One witness corroborated this statement, and two witnesses stated that they did not observe Dr. Woehl tell her to sit. Dr. Woehl himself vehemently denied ever silencing Complainant at the meeting (TR 954). Even if Dr. Woehl did instruct Complainant to sit down at the meeting, this cannot be construed as an adverse action, as there was no conceivable tangible job consequence.

Complainant also contends that Mr. Gelbrich made several statements to her that constituted adverse actions. First, he told her to come to him with her environmental concerns before reporting them to a government agency. Second, he wrote to her that “[y]our continued accusations and characterizations of my integrity are again noted.” Third, he orally informed her in a goal-setting meeting that she needed to include communicating consistently in a professional manner in her goals. *See Complainant’s Post Hearing Brief*, at 11. None of these examples constitute adverse actions. There is no evidence that Mr. Gelbrich told Complainant that he would discipline her if she failed to come to him first with her environmental concerns, and in fact no discipline took place and no notation was placed in her file as a result of his statements. Significantly, Complainant does not allege that Mr. Gelbrich told her not to report environmental concerns to government agencies or threatened discipline if she reported her concerns to government agencies. Likewise, while Complainant stated that she felt like she was “in big trouble” (TR 143) when Mr. Gelbrich noted her continued characterizations of his integrity, Mr. Gelbrich took no action to discipline or formally warn Complainant regarding her behavior. Additionally, Mr. Gelbrich’s orally informing Complainant that she needed to include an objective of communicating consistently in a professional manner is not itself an adverse action, but is a suggestion for improvement so far removed from a disciplinary process or tangible job consequence that it cannot be considered an adverse action. Rather, all of Mr. Gelbrich’s statements are nothing more than daily feedback, which, while at times unfavorable and perhaps unwelcome, are part of the normal communication process between employee and supervisor, and are part of the supervisory process that allow smooth workplace operation and encourage employee performance improvement. *See Shelton*, ARB No. 98-100, ALJ No. 1995-CAA-19, citing *Davis v. Town of Lake Park*, 245 F.3d 1232 (11th Cir. 2001). Such statements have absolutely no tangible job consequences for the employee to whom they are directed.

Next, Complainant states that Goal Three, instructing her to communicate consistently in a professional manner, was an adverse action. Respondent denies that this goal was an adverse action, and provided lengthy testimony by Mr. Gelbrich and Dr. Stickney regarding the school's professional growth and disciplinary processes. Respondent points out that, according to its "Educators' Handbook for Professional Growth," (RX 36), the implementation of a goal is not considered part of the disciplinary process (TR 541, 545-46). Still, it is clear from her e-mail communications that Complainant did not agree with the goal or aid in its writing, and the goal specifically states that it is "directed by the principal," so it cannot be construed as merely a voluntary plan of self-improvement (RX 27). Further, unlike Complainant's other goals, which clearly highlight areas where her performance was satisfactory but could be exemplary, the goal indicates that Complainant's performance was below the acceptable professional standard, and that Complainant needed to immediately improve in the area. The imposition of Goal Three had tangible job consequences for Complainant, as she was directed to attend workshops on problem solving, select a staff member to help monitor her behavior, and periodically meet with Mr. Gelbrich to evaluate her performance. Also, a potential employer, who does not have an intimate understanding of the school's somewhat confusing professional growth handbook, could only consider the goal a negative notation in Complainant's file. Finally, Mr. Gelbrich testified that Complainant could eventually be terminated if she failed to meet the requirements of Goal Three, although it would not result in her immediate termination (TR 430). Thus, while Mr. Gelbrich chose not to characterize Goal Three as one of the school's more formal disciplinary processes, he directed Complainant to work on her professionalism, and if she refused to improve in this area, she could eventually be terminated. As such, the imposition of Goal Three is a disciplinary action regardless of Respondent's chosen characterization of it. Therefore, Respondent took an adverse employment action against Complainant when it directed her to communicate consistently in a professional manner.

Complainant also contends that Respondent took an adverse action against her by giving her a reduced performance evaluation. If Respondent had in fact given her a reduced performance evaluation which had tangible job consequences, this could be an adverse action. *See, e.g., Ilgenfriz v. U.S. Coast Guard Academy*, ARB No. 99-066, ALJ No. 99-WPC-3 (ARB Aug. 28, 2001); *cf. Boytin v. Pennsylvania Power & Light Co.*, 94-ERA-32 (Sec'y Oct. 20, 1995). However, any suggestion that Complainant's spring 2000 evaluation was negative simply fails. Rather, the evaluation was glowing, praising the academic rigor of her program, her willingness to work well beyond her job requirements, and her progression on all of her goals (RX 32). At the hearing, Complainant protested that if read "between the lines" (TR 277), some positive comments in the evaluation could be construed as negative, and that "there are back-handed compliments" (TR 879). I do not agree; and when pressed to substantiate her assertion that the evaluation was negative, Complainant stated, "I don't feel this is – this – I guess what it is to me, is that it – it's not as flowing. It's not the same kind of evaluations that I have received in the past. The – it's more of a running monologue" (TR 879-80). The mere format of the evaluation does not make it negative. In fact, at least one other employee's positive evaluation from that year was also written in the narrative format (RX 37).

Additionally, the content of Complainant's 2000 evaluation is similar to and equally complimentary as her spring 1998 evaluation, and even highlights many of the same professional strengths (RX 16; RX 32). Finally, Complainant protests that Mr. Gelbrich specifically referenced her progress toward communicating consistently in a professional manner, claiming that he had promised her he would not do so. This claim is simply not credible. In the fall of 1999, Mr. Gelbrich had made abundantly clear that Complainant must improve her professionalism. It is difficult to imagine why, given his adamance on the issue, he would ever promise her that he would not directly address the goal in her evaluation. Further, in addressing her progress on Goal Three, Mr. Gelbrich made nothing but positive comments, stating that her communications since setting the goal in place were *at all times* professional (RX 32). While Complainant clearly dislikes and disagrees with Goal Three, Mr. Gelbrich's stating that she had improved herself in the area cannot be construed as an adverse action or even a negative statement. In sum, Complainant's spring 2000 evaluation was highly complimentary, and cannot be considered an adverse action.

Finally, Complainant contends that Respondent took an adverse action by creating a hostile work environment. The creation of a hostile work environment does not result from a specific adverse action, but evolves from harassment that is "sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile work environment." *Smith v. Esicorp, Inc.*, 93-ERA-16, (Sec'y Mar. 13, 1996), citing *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). In evaluating hostile work environment claims, the Secretary has adopted the analysis developed in Title VII race and sex discrimination cases. The standard includes five elements:

- (1) the plaintiff suffered intentional discrimination because of his or her membership in the protected class;
- (2) the discrimination was pervasive and regular;
- (3) the discrimination detrimentally affected the plaintiff;
- (4) the discrimination would have detrimentally affected a reasonable person of the same protected class; and,
- (5) the existence of *respondeat superior* liability.

Smith v. Esicorp, Inc., 93-ERA-16, (Sec'y Mar. 13, 1996), quoting *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 753 (3d Cir. 1995). Complainant contends that she "experienced, from August 1999 to April 2000, a constant stream [sic] of adverse actions, disciplinary memos, comments and admonitions, a directed goal with compliance plan built within in [sic], and coworker antipathy and attacks, all on the school premises." See *Complainant's Post Hearing Brief*, at 39. The record contains absolutely no evidence, either in the numerous exhibits or lengthy transcript, of "disciplinary memos," and, as previously established, Complainant only experienced one relatively minor adverse action, which was the directed goal.

This leaves only the alleged "coworker antipathy and attacks," which Complainant apparently believes consisted of the April 2000 e-mails, staff members' meeting with Mr. Bailey, and Mr.

Montalbano's letter printed in a local paper. By all accounts, there was considerable tension within the staff regarding the ongoing environmental allegations and media attention focused on Wilsonville Primary. Further, the e-mails from early April indicate that some staff members disagreed with Ms. Clark's and Complainant's perspective regarding the gravity of the school's environmental problems and their approach to addressing these problems. The e-mails also show some staff members encouraging each other to "gang-up" against Complainant and Ms. Clark's position, in that they encouraged other staff to voice agreement with their perspective, and referred to their perspective as the "true voice" of the school. However, the e-mails were not abusive, physically threatening or humiliating. See *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2, 1997-CAA-9 (ARB February 29, 2000), citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). While the teachers expressed strong disagreement with Complainant's position, they did not encourage each other to treat her differently and said absolutely nothing about her personally. Similarly, the informational meeting run by Mr. Bailey was not discriminatory or abusive. Both Ms. Clark and Complainant were invited to attend. Mr. Bailey reminded teachers to remain respectful, stated that the meeting was not organized to personally criticize either woman, and informed the teachers that he would report everything said at the meeting back to Complainant and Ms. Clark. Finally, Mr. Montalbano's letter, while it unfavorably characterized the environmental activists as extremists who were holding the school hostage, does nothing but express the opinion of a co-worker. In sum, Complainant fails to establish that any intentionally discriminatory acts took place. Rather, her co-workers disagreed with Ms. Clark's and Complainant's actions, which they believed disparaged Wilsonville Primary School, and expressed their opinions in e-mails and a letter to a newspaper. That Complainant may have been offended by these remarks does not mean that a hostile work environment was created.

While it is unnecessary to discuss the remaining elements in a hostile work environment claim, it is notable that Complainant cannot establish that the several e-mails and other activities in April established "pervasive and regular" discrimination sufficient to cause a reasonable person distress, and cannot establish that Respondent was accountable for all of the activity. As Respondent points out, the behavior took place primarily over a two to three day period. Further, while it was not intended to please Complainant, the behavior would not have caused a reasonable whistleblower significant distress. Finally, Respondent cannot be held accountable for every statement, expression, and opinion of Complainant's co-workers. Where an employer has either actual or constructive knowledge of discriminatory behavior by colleagues, it must protect its employees, a responsibility this court takes very seriously. However, where employee communication, although critical of colleagues, remains within the normal tenor for that workplace, Respondent has no obligation, nor even a right, to quell such expression. Based on the evidence of record, Complainant has failed to establish that a hostile work environment was created.

c. Employer's Motivation For Adverse Action

It has been established that, although not an action with grave immediate consequences, Respondent's imposition of Goal Three was an adverse employment action. Complainant must next establish that Respondent's adverse employment action was motivated, in whole or in part, by her protected activity.

Complainant states that Mr. Gelbrich's memorandum of November 8, 1999 (CX 51) makes clear that Goal Three was retaliatory and based on her protected activity. *See Complainant's Post Hearing Brief*, at 11. She points out that, in implementing Goal Three, Mr. Gelbrich specifically referenced her behavior during the environmental damage incident at Willamette Primary in 1994 and her behavior during the summer and fall of 1999 surrounding the environmental issues at Wilsonville Primary. Mr. Gelbrich's concern with Complainant's behavior in her environmental advocacy could indicate a retaliatory motive. However, assuming *arguendo* that Complainant could establish this final element to her case, Respondent has provided abundant evidence to show that it would have taken the same action even in the absence of the alleged improper motive.¹⁶

As the factual background illustrates, the record in this case is replete with evidence that Complainant had recurring problems with her professional interpersonal communications, starting at the previous school when she told the principal that she had lost faith in her (TR 804-05). Within her first two years of teaching at Wilsonville, Mr. Gelbrich apparently discussed complainant's conduct toward him, and she apologized for "[coming] on so strong" when "challenging you words or actions" (RX 12). With the exception of her first teaching year, Complainant engaged in disputes with Mr. Gelbrich or fellow teachers regarding teaching aides *every year* of her tenure at Wilsonville Primary (TR 78-80; RX 1; RX 7; RX 17–RX 20; RX 23; RX 24). Additionally, on several occasions Complainant refused to work with teachers who did not share her perspective (RX 8; RX 18), and attacked her colleagues' character, integrity, and interest in "the good of the children" when she disagreed with their actions or positions (RX 17; RX 18). Finally, and most troubling, Complainant informed her principal that he demonstrated no integrity or honesty because she disagreed with his Fall 2000 division of aide time (RX 23; RX 24).

Particularly harmful to Complainant's case is her original 1998 evaluation in which Mr. Gelbrich addressed her need to improve her professionalism (RX 15). In this evaluation, Mr. Gelbrich referenced her need to improve communication based on her conflict with Ms. Renne in which Complainant accused her colleague of "being incredibly selfish" and ultimately cut off communication

¹⁶ Respondent presented a significant amount of evidence of Complainant's unprofessional conduct after Goal Three was implemented. I will not consider this evidence in determining whether Mr. Gelbrich had a legitimate motive in implementing Goal Three, as it is not probative of Respondent's reasoning in the Fall of 1999.

with her. Complainant's contention that any difficulty with Ms. Renne resulted from Ms. Renne's chronic communication problems is not persuasive. The record makes clear that several teachers found Ms. Renne difficult to work with; however, this fact does not exempt Complainant's own behavior from scrutiny. Even a cursory review of the evidence shows that Complainant made a series of pejorative statements to Ms. Renne and failed to effectively address her conflicts with Ms. Renne (RX 1-RX 8). Further, the original 1998 evaluation shows that Mr. Gelbrich noted Complainant's unprofessional communications over a year before she participated in any environmental activism. Mr. Gelbrich's concern expressed in this evaluation – that Complainant learn to manage her anger during conflicts – was identical to the issues he raised in her evaluation following her whistleblowing activities.

Moreover, Complainant's contention that for a year preceding her evaluation she had no problems with communication other than those involving her environmental activism is simply untrue. To the contrary, she had repeated and ever-escalating problems communicating with her colleagues between her spring 1998 and spring 2000 evaluations. In the fall of 1998, Complainant became embroiled in a conflict with the first grade teachers in which her behavior was even more appalling and inappropriate than was her behavior with Ms. Renne the previous year. In fact, the first grade teachers even considered filing a union grievance against her, and discussed the issue with Mr. Gelbrich. Complainant herself admitted in a formal apology letter that her behavior was "cruel and heartless." This letter, which ended her on-going dispute with the first grade teachers (at least until the fall of 1999), was written only a month before Complainant began her environmental activism, and well under a year before Mr. Gelbrich instituted Goal Three. Additionally, Complainant *again* acted injudiciously regarding the division of aide time between kindergarten and first grade in the fall of 1999, immediately before Mr. Gelbrich instructed her to incorporate a goal of working on her professional communication (RX 23; RX 24). In this instance, Complainant directly attacked her immediate supervisor's integrity and honesty in e-mail communications to him. In sum, Mr. Gelbrich's instruction to Complainant to improve her professional communication was entirely valid and even long overdue. It is clear that Goal Three would have been put in place regardless of whether the complainant engaged in protected activity, and was not a response to the protected activity.

Although at the hearing she vehemently defended all of her communications,¹⁷ Complainant

¹⁷ Complainant testified that saying "you are being incredibly selfish!" was not "discourteous, just honest" (TR 790); that telling Ms. McCarney she had lost faith in her to do right by the children was just "expressing to her how I felt" (TR 807); that informing the first grade teachers she would only communicate with them when she absolutely had to was courteous and respectful because she was just "stating a fact" (TR 818); and that informing Ms. Terrall that she could not teach her daughter was both professional and responsible because "Lisa hurt me" (888). Regarding her professional communications in general, she asserted that all of her comments were justified, responsible, and truthful (TR 846), and denied ever losing her temper (TR 810), although she later defended her behavior by saying "everyone gets mad" (TR 812).

argues that even if her behavior was not at all times professional, Respondent did not discipline other employees for similar behavior. But none of her colleagues engaged in similar behavior. Complainant points out that Respondent did not discipline Ms. Terrall for her initial April 2000 e-mail, in which she said something did not have a “chance in hell”; that it did not discipline any of the teachers for their April 2000 e-mails; it did not discipline Mr. Montalbano for his letter to the paper; and did not discipline Ms. Frisiras for telling Mr. Gelbrich at a public meeting that many of his teachers had lost trust in him. However, even if these actions were as objectionable as those of the Complainant, they were all isolated instances, whereas Complainant’s objectionable acts have been occurring with unfortunate regularity over many years. *Cf.* TR 340, 440. In fact, it is clear that Complainant has never been subject to an adverse action for any single incident, and was subjected to only minimal adverse action despite her history of verbally abusing her supervisors and colleagues.

In addition, Respondent presented several teachers’ evaluations and plans of assistance, all of which are sealed, to show that it had instructed other teachers to work on their professional communication (RX 37– 43). This evidence shows that Respondent has considered employees’ professional communication in their evaluations, and rebuts Complainant’s assertion that the concern was pretextual. Comments in the evaluations include instructing teachers to develop “a positive working relationship with other members of the staff” (RX 37), develop “collaborative relationships on her team and across our school,” (RX 38), “promote positive and constructive professional relationships with her team” (RX 39), “provide leadership in managing conflicts and issues that arise” (RX 39), to “[focus] on communication” (RX 40), and “[manage] conflict among students and parents in a positive manner” (RX 42). These exhibits demonstrate that Respondent frequently addresses teachers’ professional communications in their evaluations.

Finally, Complainant presented evidence that Respondent had discriminated against other whistleblowers. While evidence of a pattern of discrimination can be probative of a Respondent’s intent, *see Morgan v. National Railroad Passenger Corp.*, 232 F.3d 1008 (9th Cir. 2000), the evidence in this case fails to support the finding of a retaliatory intent. Ms. Lewallen’s examples of ways in which she felt retaliated against were largely rebutted by Dr. Stickney’s testimony. *See supra* at pp. 21-22. Additionally, Mr. Gelbrich’s instruction that she “think like an administrator” appears to have been sound advice for Ms. Lewallen to rationally examine the situation and choose what was truly best for the students and teachers, based on the EPA’s test results and inspections, rather than to unnecessarily shut down the school in a panic. Most damaging to Ms. Lewallen’s testimony, however, is her claim that Dr. Stickney referred her to other job opportunities in an attempt to push her out of the school district. In fact, the position offered was a prestigious temporary placement, and Ms. Lewallen would have returned to work for Respondent after she completed her term.

Ms. Clark also testified that Respondent discriminated against her, and she was clearly unhappy at the school by the spring of 2000, as she resigned and sought alternative employment after a lengthy tenure there. The evidence of discrimination against her came only through her self-serving testimony, in

which she vaguely referenced a reduced performance evaluation and stated that Mr. Gelbrich made it difficult for her to perform her job. Complainant provided little elaboration and no corroborating evidence to support Ms. Clark's testimony, such as Ms. Clark's evaluation; and Respondent apparently did not feel the need, particularly with Ms. Clark's own case pending, to present evidence to rebut her allegations of discrimination. Ms. Clark's vague allegations of discrimination are not very helpful to show a discriminatory motive, and do little to aid Complainant's case. Therefore, neither witnesses' testimony supports a finding of a discriminatory intent in Respondent's adverse action. Further, the testimony of Ms. Frisiras that she was not adversely affected by her comments at the public meeting supports Respondent's position that it did not retaliate against teachers who questioned the district's actions in the summer of 1999.

Respondent has shown that, apart from her behavior surrounding her whistleblowing activities, Complainant evidenced chronic failures to communicate professionally. Further, in examples where it has declined discipline, Respondent has successfully differentiated between other teachers' behaviors and Complainant's. Respondent has also shown that it addresses professional communication where it considers appropriate, providing several recent examples of teachers who were not whistleblowers who were instructed to improve their professional communication. Finally, Complainant has failed to prove intent through examples of other discrimination against whistleblowers.

C. Conclusion

Accordingly, I find that Respondent would have taken the same adverse action against Complainant regardless of her status as a whistleblower. Complainant has failed to establish a hostile work environment, as she did not suffer intentional discrimination that was pervasive and regular. Further, her claim of a reduced performance evaluation is specious, and her other alleged adverse actions demonstrated no tangible job consequences. Only the imposition of Goal Three was an adverse action with potential job consequences. However, even if Complainant could show that Goal Three was motivated by her protected activity, Respondent has successfully shown that it would have taken the same action regardless of her status as a whistleblower. Therefore, Complainant has failed to establish a violation of the employee protection provisions of the Toxic Substances Control Act, and the complaint should be dismissed.

RECOMMENDED DECISION AND ORDER

IT IS RECOMMENDED that this case be dismissed.

A

JEFFREY TURECK

Administrative Law Judge